Supreme Court, U.S.
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No. 92-652

In The

Supreme Court of the United States

October Term, 1992

DAVID E. PAPENDICK, M.D.,

Petitioner,

vs.

LOUIS SULLIVAN, SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY, APPEALS COUNCIL #000-54-7038,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Respondent has asserted various legal positions and factual allegations that are not consistent with the facts and law nor complete in their presentation. First, the Respondent asserted on page 5 of his brief that the "Petitioner declined to request a meeting with WIPRO". While that is technically correct, it ignores the fact that the Petitioner had not been informed that he could be represented by counsel at the meeting with WIPRO or that a corrective plan could be negotiated at such a meeting. The latter was not explained to him,probably because WIPRO did not normally negotiate such corrective plans. This refusal to extend the opportunity to undertake corrective plans as required by statute [42 U.S.C. § 1320c-5(b)] (Pet. App. 55a) was based upon financial considerations of WIPRO, as testified to by Dr. Jonathan Moulton (Pet. App. 52a), WIPRO's expert witness at Petitioner's administrative exclusion hearing.

The Respondent seeks to have this Court deny Petitioner its review based on the Respondent's erroneous assertion that "Petitioner does not challenge the court of appeals' holding that 'abundant' evidence supports the Secretary's determination that he grossly and flagrantly violated his obligations under Section 1156 and was unable and unwilling substantially to comply with those obligations." This is erroneous on two basis. First, the Petitioner *does* dispute such a finding and second, the Respondent confuses the certiorari worthiness of a particular issue in a lawsuit with the certiorari worthiness of the lawsuit, itself. The fact that Petitioner did not seek to have this Court weigh through minutia of evidence to determine if the court of appeals erred as to its weighing of evidence as to a possible gross and flagrant violation does not mean that Petitioner concedes that issue, but, rather, recognizes that such an issue is unworthy for this Court's consideration.

The fact that the Respondent reinstated Petitioner in the

departmental health care programs prior to the completion of Petitioner's administrative review (Pet. App. 41a, 43a) is substantial evidence that Petitioner was in fact able and willing to comply with his obligations for the IG was required to determine that it had reasonable assurance that a reoccurrence of the cause for exclusion would not take place, prior to reinstating Petitioner [42 C.F.R. § 1004.120(a)] (Pet. App. 59a). These simple facts demonstrate that Petitioner was and is no medical butcher but, rather, was legal fodder for the OIG's quota system.

Next, we must consider the Respondent's repeated mischaracterizations concerning the ALJ's determination that he had no jurisdiction to consider constitutional issues. On page 6 and page 14 of Respondent's brief, the Respondent asserted that the ALJ advised the parties that "they could *raise* those issues (constitutional or procedural) 'in their closing briefs, in order to preserve them for an appeal.' " (emphasis added). Furthermore, the Respondent asserts on page 14 that "in this Court petitioner does not dispute the district court's determination that he could have obtained evidence bearing on his due process claims under the Secretary's hearing procedures."

First, the ALJ did not advise the parties that they "raise" constitutional or procedural issues in the briefs but, rather, that "the parties *may* (not must) however *insert* objections on procedural/ constitutional issues in their closing briefs, in order to preserve them for appeal." (emphasis added). This was after the ALJ specifically held that he "has no jurisdiction to rule on constitutional issues." (p. 38a). This latter determination of the ALJ was not administratively appealed by the Inspector General and it must be considered a final determination of the agency. The Petitioner happened to agree and agrees with the ALJ's assertion of his limited authority. Therefore, Petitioner had nothing to appeal as to that decision. The ALJ did not invite the parties to *raise* such issues but to *insert* them. The ALJ did *not authorize* the parties *to*

litigate constitutional/procedural issues nor *to document* these issues. He did *not authorize* the parties *to subpoena witnesses* during the hearing concerning constitutional/procedural issues *nor to seek discovery*[1] as to these issues. He only extended an offer to permit the parties to "insert" the issues in their closing briefs and, at that, it was not phrased as a mandatory but permissive insertion. Indeed, he even acknowledged that he had no jurisdiction to consider such issues.

The ALJ's offer in the Petitioner's pre-hearing order was limited and reflective of his limited authority. These limitations have been codified in the Respondent's new regulations implemented January 27, 1992 (p. 61a). The ALJ did not and does not have authority to "find invalid Federal statutes or regulations or Secretarial delegations of authority;" [42 C.F.R. § 1005.4(c)(1) (Appendix at 1b, *infra*)]. Furthermore, current discovery procedures which did not even exist prior to the new regulations only provides for production of documents which are "relevant and material to the issues before the ALJ" [42 C.F.R. § 1005.7(a) (Appendix at 2b, *infra*)]. Inasmuch as the constitutionality of the secretarial delegation of authority to the OIG to exclude individuals while using a bonus/quota system is not an issue which can be raised before an ALJ, discovery does not exist even today for such an issue.

As to the ALJ's determination of his limited authority, the Inspector General did not even object thereto, let alone appeal therefrom. The Inspector General failed to exercise his administrative appeal rights and can not now assert them contrary to the procedures, then accepted by all parties.

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1. Discovery was non-existent under the prior hearing regulations and, as will be seen, discovery as to the subject issue in this matter is not available under current regulations.

Next, we must address the Respondent's assertion on page 10 that the courts correctly concluded that "Petitioner was not entitled to judicial review of his due process claims because he failed to raise them before the Secretary" and that such "conclusion, moreover, does not conflict with any decision of this Court or any court of appeals." First, such a conclusion does conflict with this Court's prior decision in *Bowen v. Michigan Academy of Family Physicians,* 106 S. Ct. 2133, 2140-2142 (1986). The fact is that this review is not predicated upon 42 U.S.C. § 405(g) jurisdiction but, rather, general federal question jurisdiction (28 U.S.C. § 1331) as under *Michigan Academy, supra.* This issue will be addressed in depth later herein.

Assuming, however, for argument sake that appeal in this matter is based upon 42 U.S.C. § 405(g) jurisdiction, the issue appealed herein is not barred by that sections exhaustion requirements. Decisions of various courts of appeal, where the exhaustion of administrative remedies was waived, are in conflict with the holding below and exhaustion should have been waived below; *see Ellison v. Califano,* 546 F.2d 1162, 1164 (5th Cir. 1977) held waiver of administrative exhaustion was appropriate when exhaustion would have been futile; *also see, Koerpel v. Heckler,* 797 F.2d 858, 866 (10th Cir. 1986); *Gipson v. Harris,* 633 F.2d 120, 122 (8th Cir. 1980); *Singer v. Schweiker,* 694 F.2d 616, 618 (9th Cir.1982); in *Klein v. Sullivan,* 978 F.2d 520, 524 (9th Cir. 1992) the court found that the administrative agency was unsuited to resolve colorable constitutional collateral challenges while finding that the matter should be moved "immediately to the district court for prompt resolution".

Aside from the waivability of the exhaustion of administrative remedies as discussed above, it is Petitioner's position that there were no administrative remedies to exhaust and under *Michigan Academy, supra,* Petitioner was and is entitled to bring an action under the general federal question jurisdiction of the district court

as defined by 28 U.S.C. § 1331. The Respondent, on page 11, relies upon *Heckler v. Ringer,* 466 U.S. 602, 614 (1984) and *Weinberger v. Salfi,* 422 U.S. 749, 762 (1975), to assert that review of Petitioner's due process claim is inappropriate. The cases of this Court cited by Respondent predate the Court's holding in *Michigan Academy, supra,* and the Respondent ignores the lessons learned from *Michigan Academy, supra.*

The fact is that when the Respondent, to whom Congress has delegated primary authority to implement the Social Security Act, fails to establish administrative appeal procedures in which to channel various constitutional issues, then these issues need not be brought on, under the Act, in order to obtain judicial review. It is as to such issues that the Social Security Act does not restrict judicial review to § 405(g) jurisdiction. For when Respondent provides no avenues for administrative review as to constitutional issues, then Respondent has relinquished any right or justification to assert the prerequisite of § 405(g) exhaustion prior to submitting Respondent's implementation of the Act to judicial review. To restrict judicial review of constitutional issues, when the Act as implemented by Respondent provides for no administrative appeal, would "raise a serious constitutional question of the validity of the statute as so construed", *Salfi, supra,* 762. If the Respondent established procedures to provide for a meaningful administrative appeal, then it could be argued that even constitutional issues should be first channeled through those procedures; however, without such procedures in which to channel such administrative appeals, the constitutional issues need not be and cannot be first presented to the agency under § 405(g) jurisdiction, but, rather, general federal question jurisdiction of the district courts is to be presumed available.

This Court addressed methodology issues in *Michigan Academy, supra,* 2138-2142, and distinguished them from amount determinations. The amount determination of a financial claim

case could be said to be the equivalent to an outcome determination when considering whether or not to exclude a provider from Medicare participation and for what period of time. This type of determination is in contrast to a determination as to the validity of the method of how a provider is to be excluded. In general, the Secretary has not provided for administrative appeals pertaining to challenging the methodology procedures used in determining how a provider is to be excluded; but, rather, only, within certain limits[2], as to the outcome of whether a provider is to be excluded and if so, for what period of time.

In the present case, the bonus/quota system of the OIG is not an issue which is subject to the administrative appeal process and cannot be considered to have an administrative appeal procedure available through which the constitutionality of the issue could be channeled. Furthermore, the methodology of the Respondent's determination process is what is being challenged and not the amount (or outcome). Because of the foregoing, it would not be appropriate to restrict Petitioner's appeal to 42 U.S.C. § 405(g) jurisdictional grounds.

In the present case, an individualized application of a specific regulation is not in issue. The structure or methodology of the administrative exclusion process itself is in issue. What must be

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2. Under current regulations, the ALJ's authority is restricted to determining if a violation of certain discretionary exclusionary provisions under the Act has occurred. If such a violation has occurred, then the ALJ is precluded from reviewing the OIG's exercise of discretion in determining to exclude a provider [*see* 42 C.F.R. § 1005.4(c)(5) (Appendix at 1b, *infra*) and § 1005.4(c)(7) (Appendix at 1b, *infra*)]. Thus, there is no administrative review to determine if the OIG has abused the exercise of his discretion, exercised his discretion on the basis of illegal criteria or has otherwise violated due process in the exercise of his discretion to exclude a provider. This absolute, non-reviewable discretion sought by the OIG is more in accordance with the procedures of a police state than a democracy.

addressed is the constitutionality of the Respondent's delegation of authority to the Inspector General wherein the Inspector General is applying such a bonus/quota system.[3] Petitioner was entitled to a *fair* and *impartial initial decisionmaker* and this is what *he was denied.* The administrative appeal procedures *does not* and *cannot* address this issue. Therefore, the issue cannot be said to be restricted to being addressed through 42 U.S.C. § 405(g) jurisdiction. The issue is of a constitutional dimension and Congress must be presumed to have expected that it would have a judicial forum in which to be heard, *Michigan Academy, supra,* 2140-2142, and *Salfi, supra,* 762. Respondent cannot be permitted to deprive Petitioner and others similarly situated of judicial review of constitutional issues by precluding administrative review procedures. This issue cannot be resolved merely by an ALJ applying a regulation to come to a different amount (outcome) determination because it cannot to be resolved by merely altering the application of a regulation. It involves a structural defect in the Respondent's administrative procedures and an ALJ has no more authority to correct it (p. 61a), than the Respondent Secretary has to correct an unconstitutional act of Congress.

The issue herein addresses the structure of the administrative exclusion process and it is not "inextricably intertwined" with an amount (outcome) determination as argued by the Respondent on page 13. On page 13, the Respondent misstates a factor which Respondent alleges to be pertinent for this Court's consideration. Thereat, the Respondent asserted that the Petitioner sought relief that was "solely aimed at reversing the effects of his exclusion, rather than revamping the Secretary's decision-making

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3. The Respondent has not challenged in this litigation the characterization, of the Performance Appraisal System of the OIG official exercising exclusion authority, as being a quota/bonus system.

procedures."[4] In reality, Petitioner sought injunctive relief against the Respondent which would structurally alter the Respondent's exclusion process. Petitioner's prayer to the district court in his complaint included relief "enjoining the Defendant not to cause or permit any further PRO review of or exclusion against Plaintiff while the PRO's are under the direction and supervision of the OIG." This would certainly result in a revamping of the Respondent's administrative procedures if Respondent honored the court's determination. If the Respondent were to ignore the court's determination, then nothing could constitute relief resulting in the revamping of the Secretary's decision-making procedures.

The following factors should be considered in determining that the quota/bonus system issue addressed herein should be litigated under general federal question jurisdiction instead of

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4. Petitioner does not concede that if this were the case, as alleged by the Respondent, that the relief Petitioner sought somehow relegated Petitioner's claim to a status less entitled to consideration under general federal question jurisdiction. Otherwise, only class action type cases would be entitled to consideration as methodology type cases. If Petitioner was not concerned about revamping the Respondent's structure but only in obtaining the relief for himself, other claimants similarly situated would still be entitled to apply under Fed. R. Civ. Proc. 71 for enforcement of similar injunctive benefits as Petitioner. As for Petitioner's issue being "inextricably intertwined" with an amount (outcome) determination, Respondent can always assert that methodology relief will effect the outcome of administrative litigation because procedural safeguards often effect the outcome of administrative processes. That is why they exist. Therefore, merely because the outcome of an administrative process may be effected by the resolution of a constitutional issue, it does not mean that such result makes the issue an amount (or outcome) issue versus a methodology issue. Indeed, the Respondent could, often in administrative matters involving contested methodology issues, correct the constitutionally defective procedure and re-initiate his review under a constitutionally correct methodology, if the corrected procedure showed that the situation warranted such an effort.

§ 405(g) jurisdiction. The issue, which is being addressed, is of a constitutional dimension. Respondent did not (and does not) provide for a direct administrative appeal process to address the issue in question. The issue pertains to the methodology of how the Respondent's decision-making process functions and not a specific, limited application of a regulation.[5] Because the Respondent does not provide for administrative appeal of issues such as the subject delegation of authority issue raised herein, because it is of a constitutional dimension and because it pertains to the methodology of how the Respondent's decision-making process functions, it is clear that general federal question jurisdiction can be and ought to be applied in this matter.[6]

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5. However, an unconstitutional regulation, which directly relates to how a decision is made, without meaningful administrative appeal procedures, can also constitute an issue for general federal question jurisdiction.

6. Not all factors have to be answered affirmatively to result in general federal question jurisdiction. In this matter, all such factors indicate the appropriateness of such jurisdiction.

CONCLUSION

Based upon the foregoing, Petitioner ought to be granted a writ of certiorari for the review of the constitutionality of his exclusion wherein the OIG used a bonus/quota system in its initial exclusion determination of Petitioner. Whether this judicial review is based upon 42 U.S.C. § 405(g) jurisdiction or general federal question jurisdiction (28 U.S.C. § 1331), this fundamental issue of fairness should be considered by this Court.

Respectfully submitted,

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Dated: December 30, 1992

APPENDIX A — EXCERPTS OF FEDERAL REGULATION 42 C.F.R. § 1005

42 C.F.R. § 1005.4(c)(1)

> (c) The ALJ does not have the authority to—
>
> (1) Find invalid Federal statutes or regulations or Secretarial delegations of authority;
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> * * *

42 C.F.R. § 1005.4(c)(5)

> (5) Review the exercise of discretion by the OIG to exclude an individual or entity under section 1128(b) of the Act, or determine the scope or effect of the exclusion.
>
> * * *

42 C.F.R. § 1005.4(c)(7)

> (7) Review the exercise of discretion by the OIG to impose a CMP, assessment or exclusion under part 1003 of this chapter.

Appendix A

42 C.F.R. § 1005.7(a)

§ 1005.7 Discovery.

(a) A party may make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the ALJ.

* * *